

COMMITTEE ON PROFESSIONAL ETHICS

Respectfully submits the following position on:

*

ADM File No. 2002-24

*

The Committee on Professional Ethics is comprised of members appointed by the President of the State Bar of Michigan.

The position expressed is that of the Committee on Professional Ethics only and is not an official position of the State Bar of Michigan, nor does it necessarily reflect the views of all members of the State Bar of Michigan.

To date, the State Bar does not have a position on this matter but is authorizing Committee on Professional Ethics to advocate their position.

The total membership of the Committee on Professional Ethics is 14.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 14. The number who voted in favor to this position was 14. The number who voted opposed to this position was 0.

COMMITTEE ON PROFESSIONAL ETHICS

CHAIR

Stanley H. Pitts
Honigman Miller Schwartz & Cohn
660 Woodward Ave Ste 2290
Detroit, MI 48226-3506

COMMITTEE MEMBERS

William J. Ard, Williamston
Michael P. Ashcraft, Jr., Bloomfield Hills
John G. Cameron, Jr., Grand Rapids
Donald D. Campbell, Southfield
Stephanie L. Crino, East Lansing
Joseph L. Hardig, III, Bloomfield Hills
Robert P. Hurlbert, Bloomfield Hills
Daniel R. Hurley, Detroit
Kevin Kalczynski, Detroit
Larry W. Lewis, Portland
G. Michael Meihn, Ferndale
Amy Neville, Detroit
Steven M. Ribiat, Bloomfield Hills

November 10, 2010

Corbin R. Davis
Supreme Court Clerk
Michigan Supreme Court
Michigan Hall of Justice
P. O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2002-24

Proposed Amendment of Rule 7.3 of the Michigan Rules of Professional Conduct (MRPC)

Dear Clerk Davis:

The State Bar's Standing Committee on Professional Ethics ("Committee") requests the Michigan Supreme Court reject the proposed amendment of MRPC 7.3. The Committee believes the proposed language is overbroad, ambiguous and likely to create confusion.

The State Bar supports the adoption of the changes to MRPC 7.3 proposed in ADM File No. 2003-62. Unlike those changes, the changes to MRPC 7.3 proposed in ADM 2002-24, paragraph (c) are not limited to targeted mailings. If adopted, MRPC 7.3(c) would require lawyers to affix the phrase "Advertising Material" to every "written, recorded, or electronic communication...seek[ing] professional employment."

The rule neither defines what constitutes "seeking employment" nor articulates what standard is applied in measuring whether that has occurred. It is, therefore, unclear whether the rule would require a subjective examination of the author's intent or an objective assessment of whether a reasonable person would believe that the communication was intended to seek employment. Stated another way, it is unclear whether the *content* must express the author's quest for employment or whether what's determinative is the *lawyer's* motivation in sending the communication, regardless of its actual content. It is also unclear whether seeking employment must be the author's sole motivation or merely one among many reasons for sending the communication in order for the rule to apply. The phrase "soliciting professional employment," used in the ADM File No. 2003-62 language, is more easily understood than the term "seeking" employment.

In describing what communications are excluded, the rule does not define what is meant by a "prior professional relationship." Must the lawyer have provided legal

services to the recipient in the past? Would serving together on a nonprofit board qualify? Could the lawyer send a letter to the lawyer's own accountant or architect, persons with whom the lawyer had a prior professional relationship, without being required to include the phrase "Advertising Material" in the communication?

It is commonly understood that the goal of lawyer advertising regulation is to protect unsophisticated, prospective legal consumers from lawyers making false or misleading claims, but the labeling requirement in proposed paragraph (c) does not advance that purpose because it does not prevent the dissemination of false or misleading communication. Further, the breadth of the proposed language fails to take into account the many recipients of communications sent by lawyers who are not unsophisticated.

The Committee believes that imposition of the proposed rule will create confusion among lawyers about its intended application, fail to realistically advance public protection, and might have a chilling effect on lawyer communication intended to update the public about changes in the law.

For these reasons, the Committee respectfully requests the Court to reject the proposed revision of MRPC 7.3 published for comment in ADM File No. 2002-24. The Committee's concerns are specific to the language of the amendment as published. We support the changes that were proposed in ADM 2003-62. The Committee does not have a position on other possible amendments to MRPC 7.3 to effectuate improvements in protection of the public concerning lawyer advertising, but in the absence of a description of the specific problem the proposed amendment seeks to address, the Committee cannot recommend changes to the current rule beyond those proposed in ADM 2003-62.

Sincerely,

Stanley H. Pitts
Chair, Standing Committee on Professional Ethics

cc: Board of Commissioners for the State Bar of Michigan
Representative Assembly Chair